



**IN THE COURT OF APPEAL OF
NEWFOUNDLAND AND LABRADOR**

Citation: *Thorne v. College of the North Atlantic*, 2018 NLCA 33

Date: June 6, 2018

Docket: 201601H0105

BETWEEN:

DEBORAH THORNE

APPELLANT

AND:

COLLEGE OF THE NORTH ATLANTIC

RESPONDENT

Coram: Welsh, Hoegg and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201306G0131
(2016 NLTD(G) 165)

Appeal Heard: October 12, 2017

Judgment Rendered: June 6, 2018

Counsel for the Appellant: James Hughes Q.C. and Philip Whalen

Counsel for the Respondent: David Eaton Q.C.

Hoegg J.A.:

INTRODUCTION

[1] This appeal concerns issues respecting a counterclaim commenced by the sole defendant in a class action certified under the *Class Actions Act*, SNL 2001, c. C-18.1 (the *Act*).

[2] In *Thorne v. College of the North Atlantic*, 2014 NLTD(G) 94, a class action against defendant College of the North Atlantic (CNA) was certified and Deborah Thorne was appointed the representative plaintiff. CNA subsequently filed its defence along with a counterclaim, following which Ms. Thorne applied to have CNA's counterclaim struck on the basis that it did not disclose a cause of action. The applications Judge allowed Ms. Thorne's application and struck the counterclaim. CNA appealed that ruling as well as the certification of Ms. Thorne's action.

[3] On appeal, this Court upheld certification of Ms. Thorne's class action but reversed the applications Judge's ruling which struck CNA's counterclaim and remitted the counterclaim to the Supreme Court of Newfoundland and Labrador for consideration of certification under the *Act* (*The College of the North Atlantic v. Thorne*, 2015 NLCA 47).

[4] When the matter was subsequently heard in Supreme Court, another applications Judge certified CNA's counterclaim, identifying a common issue and appointing Ms. Thorne as the "defendant" representative. Ms. Thorne appealed. Her appeal concerns whether the counterclaim filed by CNA complies with the certification provisions of the *Act*. For the reasons set out below, I am of the view that CNA's counterclaim does not comply with the provisions of the *Act* and does not meet the statutory criteria for certification. Accordingly, it cannot be certified as a class action under the *Act*.

BACKGROUND AND LITIGATION HISTORY

[5] Deborah Thorne is one of several employees (instructors or instructor support staff) who worked for the College of the North Atlantic (CNA) in the State of Qatar (Qatar) during the years 2008 to 2011. In September 2013 Ms. Thorne, as the proposed representative plaintiff for the employees, sued CNA pursuant to the *Act* for breach of contract. Her claim alleges that the employees' contracts of employment provided that CNA was to pay them a cost of living allowance (COLA) in addition to their salaries which CNA

had not paid despite their demands. Ms. Thorne pleads the terms of the employees' employment contracts including Article 5.2 of the contracts which she alleges stipulate that the employees are entitled to receive the COLA. Paragraphs 5, 6, 7 and 8 of Ms. Thorne's Amended Statement of Claim set out the basis for her claim:

5. During the summer of 2008, the plaintiff executed a contract which outlined terms governing her employment with the Defendant wherein the Defendant agreed to pay the Plaintiff the sum of \$96,122.00 per year. The contract was generally common to all members of the class referred to in paragraph 2 above with various individuals entering into a common contract at various times from 2008 onward.
6. In November, 2008, the Defendant and/or its employees, agents and assigns invoked and provided a Cost of Living Allowance (COLA) retroactive to September 1, 2008.
7. The Plaintiff repeats the preceding paragraphs and states that by virtue of the terms of the contract with the Defendant, particularly, article 5.2, the Plaintiff and all others within the Class are entitled to be paid the COLA.
8. Despite demands made to the Defendant by the Plaintiff and/or her legal counsel, the Defendant has failed to pay and/or fully pay the COLA or even provide an adequately or timely response and has chosen to avoid the issue by not communicating.

[6] Ms. Thorne applied to the Court for certification of her action and to be appointed the representative plaintiff for the other employees. On August 19, 2014, her application for certification was granted and she was appointed the representative plaintiff of the certified class (*Thorne v. College of the North Atlantic*, 2014 NLTD(G) 94). The Judge described the class at paragraph 49 as:

Instructors and instructional support staff who were employed by the College of the North Atlantic in Qatar between September 1, 2008 and November 22, 2011, who currently reside in the Province of Newfoundland and Labrador.

and stated the common issue to be:

Were members of the class entitled by their contracts of employment to receive the full amount of the COLA for the period of September 1, 2008 and November 22, 2011?

[7] The following year a sub-class composed of instructors and instructional support staff who reside in Canada but outside of Newfoundland and Labrador was added (*Thorne v. College of the North Atlantic*, 2015 NLTD(G) 38). Alan Luyt was appointed as the representative plaintiff of the sub-class. At paragraph 22 the applications Judge stated the common issue in the claim to be:

Were the members of the class entitled by their contracts of employment to receive the full amount of COLA for the period of September 1, 2008 to November 22, 2011?

CNA's Counterclaim

[8] CNA filed a defence and counterclaim in February 2015. In its defence, CNA denies that it breached its contracts with its employees and pleads the details of a contract it had with Qatar (the Comprehensive Agreement) which it says provides that its employees in Qatar were subject to a salary cap which CNA alleges affects the COLA the employees claim to be owed. CNA says that the employees were paid in accordance with their contracts of employment and the salary budget as agreed between CNA and Qatar (paragraph 10 of CNA's defence). CNA also pleads that the plaintiff and other class members were not party to its Comprehensive Agreement with Qatar and therefore cannot rely on its provisions, saying at paragraph 10(u):

The Plaintiff's claim that an amendment to the Comprehensive Agreement between CNA and the State of Qatar changed the contractual compensation entitlement of the Plaintiff and other class members is without foundation. The Plaintiff and the class members were not party to the Comprehensive Agreement and amendments to the Comprehensive Agreement had no impact on the individual employment agreement CNA had with the Plaintiff or any other class member.

[9] In its counterclaim, CNA claims that some of its employees in the class including Ms. Thorne were overpaid and seeks reimbursement of the amounts overpaid. CNA pleads the provisions of its Comprehensive Agreement with Qatar saying at paragraph 13:

The Plaintiff by Counterclaim, College of the North Atlantic ("CNA"), is a post secondary educational and skills training institution which operates in various locations in Newfoundland and Labrador and has a mailing address of 432 Massachusetts Drive, Stephenville, Newfoundland and Labrador, A2N 2Z6. At all material times to this counterclaim, CNA, pursuant to a contract with the State

of Qatar, agreed to provide and deliver educational programs and administrative services to the college owned by the State of Qatar and located in Doha, Qatar (the “Comprehensive Agreement”). The Comprehensive Agreement permitted the college to be called and operate under the name College of the North Atlantic – Qatar (“CNA-Q”).

and goes on to plead at paragraph 16 the provisions of the Comprehensive Agreement respecting salary caps which it says pertain to the class members:

The total compensation offered to instructors and instructor support persons at CNA-Q was based upon the budget agreed upon between CNA and the State of Qatar in accordance with the Comprehensive Agreement. Under the Comprehensive Agreement salaries paid to instructors and instructor support employees providing services at CNA-Q were to be capped at different levels based upon each particular employee’s qualifications (the “Salary Cap”).

[10] At paragraph 18 CNA pleads that if the plaintiffs’ class action succeeds, then CNA seeks to be reimbursed for all amounts it paid class members that are over the amount Qatar agreed to pay CNA for the employees in the class:

To the extent that the claims of the Plaintiff and class members of entitlement in accordance with the maximum amounts provided for under the Comprehensive Agreement (the Salary Cap as defined above) succeeds, CNA claims back from the Defendants by Counterclaim (i.e. each individual class member) all amounts that were paid above the maximum amounts for which the State of Qatar agreed to reimburse CNA for each instructor or instructional support employee in the class.

[11] Ms. Thorne applied to have the counterclaim struck on the basis that it did not disclose a cause of action against the class. The applications Judge struck it, saying that CNA’s premise that the employees were contractually bound by the salary cap provided by the Comprehensive Agreement was flawed and irremediably defective (*Thorne v. College of the North Atlantic*, 2015 NLTD(G) 63).

[12] CNA appealed both certification of the plaintiffs’ claim and the striking of its counterclaim. This Court upheld certification of Ms. Thorne’s action but overturned the decision striking the counterclaim and remitted CNA’s counterclaim to applications court for consideration of certification under the Act (*The College of the North Atlantic v. Thorne*, 2015 NLCA 47). The basis for this Court’s reversal of the Judge’s decision striking the counterclaim was that the Judge had considered affidavit evidence filed by

the plaintiff which the plaintiff had not had leave to file. In remitting CNA's counterclaim to applications court, this Court said:

[54] ... If CONA wishes to assert its counterclaim against members of the certified class then it would need to seek and obtain certification of its counterclaim under the *Class Actions Act*. In short it would have to meet the (relevant) criteria under the *Act*. This follows from the overall scheme of the *Act* for the trial of common issues, the result of which will bind members of the class (unless they have opted out). See section 26 of the *Act*.

[13] CNA then reapplied to applications court for certification of its counterclaim, stating the proposed common issue as follows:

Are members of the class who received compensation greater than the amount provided for in the annual budget pursuant to the Comprehensive Agreement (amounts in excess of the Salary Cap), during the period of September 1, 2008 and November 22, 2011 required to pay the excess amounts to CNA?

[14] In its application, CNA argued, in accordance with its defence pleading, that the plaintiff could not rely on CNA's Comprehensive Agreement with Qatar because the class members were not party to it. At the same time, however, CNA argued, in accordance with its counterclaim, that the plaintiff was bound by the provisions of the Comprehensive Agreement respecting the budget and salary cap as agreed between CNA and Qatar.

The Applications Judge's Decision

[15] A different applications Judge heard CNA's second application for certification of its counterclaim.

[16] In the course of considering whether CNA's counterclaim disclosed a cause of action as required by section 5 of the *Act*, the Judge reasoned at paragraphs 34 to 36 of his decision (*Thorne v. College of the North Atlantic*, 2016 NLTD(G) 165):

[34] In the Amended Statement of Claim, at paragraphs 6 and 7, Ms. Thorne avers that:

6. In November, 2008, [CNA] and/or its employees, agents and assigns, invoked and provided a Cost of Living Allowance (COLA) retroactive to September 1, 2008.

7. [Ms. Thorne] repeats the preceding paragraphs and states that by virtue of the terms of the contract with [CNA], particularly, article 5.2, [Ms. Thorne] and all others within the Class are entitled to be paid the COLA...

[35] The position of Ms. Thorne with respect to the origins of the claimed entitlement to a COLA was elucidated somewhat in its application for certification of the common issue. There, at paragraphs 9 and 10, it is claimed:

9. **THAT** an amendment was made to the Comprehensive Agreement between [CNA] and the State of Qatar that implemented the COLA increase effective September 1, 2008 (see Comprehensive Agreement at Schedule “B”).
10. **THAT** all CNA-Q contract employees who were under contract as of September 1, 2008, or who entered a contract with [CNA] subsequent to September 1, 2008, were entitled to, by virtue of their contracts, to the COLA increase that was approved and confirmed by [CNA] as effective September 1, 2008....

[36] Thus the Comprehensive Agreement is specifically referred to and relied upon by Ms. Thorne to establish her claim to an entitlement to be paid a COLA. Nevertheless, counsel for Ms. Thorne argued before me that she has not relied upon the Comprehensive Agreement to base her claim, but only upon article 5.2 of her employment contract. That is not so. Furthermore, the pleadings do not provide any particulars of how article 5.2 gives rise to an entitlement to be paid a COLA.

[17] Also, in considering CNA’s application for certification of its counterclaim the Judge acknowledged that he had to accept the facts pleaded as true. He also noted that “CNA would be satisfied if the court were to hold that Ms. Thorne, not being a party to the Comprehensive Agreement, is not entitled to any COLA referred to therein unless the same is specifically referred to in her agreements with CNA” (paragraph 40 of Judge’s decision). The Judge referenced, at paragraph 43 of his decision, a passage from this Court’s aforementioned judgment (2015 NLCA 47) which describes Ms. Thorne’s claim as resting “in part on an interaction between her contract of employment with CNA and the Comprehensive Agreement, the effect of which was (she alleges) to make CNA liable to pay her the COLA”. Importantly, this Court stated at paragraph 53 of that decision, that this description of Ms. Thorne’s claim was “by way of explanation and not as the basis for setting aside the order to strike”.

[18] The Judge appears to have recognized that certification of CNA's counterclaim did not fit within the scheme of the *Act*. However, he determined that rule 7A.01(4) of the *Rules of the Supreme Court, 1986* and section 13 of the *Act* gave him the discretion to allow CNA's counterclaim to proceed within the plaintiff's class action, saying "[b]ased upon section 13 of the *Act* and Rule 7A.01(4), therefore, I am satisfied that I may interpret and apply the *Act* and the *Rules* with the necessary changes to permit the certification of a counterclaim in a class action and to make any order necessitated in the circumstances" (paragraph 15).

[19] At paragraphs 43 to 45, the Judge concluded that CNA's counterclaim was valid. In so doing he focused on what he said was the incongruity of Ms. Thorne relying on the Comprehensive Agreement to assert her claim with her position that CNA cannot rely on it to assert its counterclaim. He also stated, at paragraph 45: "It cannot be doubted that if CNA claims that certain of its employees have been overpaid, it could commence an action in contract to recover those overpayments. It may also assert such a cause of action in a counterclaim". The Judge ruled, at paragraph 50, that the counterclaim would be asserted against all class members who advance a claim under the class action and who CNA asserts were paid more than the salary cap, and at paragraph 55 stated that he was satisfied that there was an identifiable class of two or more persons.

[20] The Judge indicated satisfaction with CNA's assertion that its proposed common issue applied to members of the plaintiff's class, saying that questions respecting individual membership in the class that would arise along the way were not an impediment to certifying the common issue CNA proposed (paragraphs 62 to 64).

[21] The Judge then certified CNA's counterclaim. In so doing, he rejected Ms. Thorne's argument that CNA's proposed common issue was not a common issue because it required that preliminary questions be answered, and said that it was not necessary that all class members be identically situated (paragraphs 60 to 64). He ordered that the certification order be amended to describe the common issues in the litigation as:

Were members of the class entitled by their contracts of employment to receive the full amount of the COLA for the period of September 1, 2008 and November 22, 2011?

and

Are members of the class who received compensation greater than the amount provided for in the annual budget pursuant to the Comprehensive Agreement (amounts in excess of the Salary Cap), during the period of September 1, 2008 and November 22, 2011 required to repay the excess amounts to CNA?

[22] In reasoning that CNA’s counterclaim involved a common issue, the Judge also rejected Ms. Thorne’s argument that certifying CNA’s counterclaim would not achieve the behavior modification objective of class action legislation because the employees had committed no wrong in receiving their salaries from CNA and their behavior was therefore not in need of modification. The Judge stated that the three objectives of class action legislation were meant to be considered together, not independently, for the purpose of deciding whether certification of CNA’s proposed counterclaim was the preferable means of resolving its claim against the employees, and went on to decide that resolution of CNA’s counterclaim within Ms. Thorne’s class action would promote the objective of judicial economy, and that the goal of judicial economy took precedence over the objectives of behavior modification and access to justice in this case.

[23] The applications Judge then appointed Ms. Thorne as an “appropriate representative defendant by counterclaim” (paragraphs 78 to 79). In so doing he found that her interest did not conflict with that of the other class members.

Leave to Appeal

[24] Section 36(3) of the *Act* requires leave to appeal a certification decision. Ms. Thorne sought leave to appeal the Judge’s decision, and in May 2017 this Court granted leave, saying that the appeal “raises a novel issue... and provides this Court with the opportunity not only to review the applications judge’s basis and reasons for certifying [CNA’s] counterclaim, but also to address relevant principles of law together with statutory interpretation” (*Thorne v. College of the North Atlantic*, 2017 NLCA 30, at para. 27). This Court identified a non-exhaustive list of issues for consideration on appeal.

The Appeal

[25] Ms. Thorne argues that the Judge erred in certifying CNA’s counterclaim. She maintains that CNA’s counterclaim does not fit within the scheme of the *Act* and that it does not meet the *Act*’s criteria for certification of a class action because it does not disclose a cause of action.

She says that the Judge misapprehended and mischaracterized her cause of action and that he failed to examine CNA's counterclaim within the context of contract law principles and class action jurisprudence, and submits that his decision effectively relieves CNA of its burden to show that its counterclaim meets the criteria for certification under the *Act*. As well, Ms. Thorne argues that the Judge's decisions respecting class definition and the representative defendant are in error as they are not supported by the provisions of the *Act*.

ISSUES

[26] The central issue on appeal is whether CNA's counterclaim is a certifiable class action under the *Act*. Resolution involves the nature of a class action, the nature of a counterclaim, application of the enabling provisions of the *Act*, and whether CNA's counterclaim discloses a cause of action. Whether the *Act* provides for a "representative defendant by counterclaim", whether Ms. Thorne's interests as a representative defendant by counterclaim conflict with other members of her class, and whether there are alternative procedures available to assist in the efficient and fair resolution of issues raised by the parties are also live issues.

STANDARD OF REVIEW

[27] The standard of review respecting certification of a class action was addressed by this Court in *Canada (Attorney General) v. Anderson*, 2011 NLCA 82, 315 Nfld. & P.E.I.R. 314 at para. 38 and in *Ring v. Canada (Attorney General)*, 2010 NLCA 20, 297 Nfld. & P.E.I.R. 86 leave to appeal to SCC refused, 309 Nfld. & P.E.I.R. 362 (note) at para. 34. Succinctly stated, whether pleadings in a class action disclose a cause of action for the purposes of section 5(1)(a) of the *Act* is a question of law reviewable on a standard of correctness. The other criteria in section 5 of the *Act* raise questions of mixed fact and law in respect of which the standard of review is palpable and overriding error, unless the judge made an extricable error in principle with respect to the characterization of a legal standard or its application, in which case the error is one of law reviewable for correctness. Accordingly, whether CNA's counterclaim discloses a cause of action is reviewable on a standard of correctness. Decisions respecting the other parts of section 5 of the *Act* involve questions of mixed fact and law and are reviewable on the standard of palpable and overriding error, unless legal standards respecting them have been mischaracterized or misapplied.

[28] The meaning and application of other provisions of the *Act* to the Judge's decision and to CNA's counterclaim also present in this case. It is settled law that statutory interpretation is a question of law reviewable on the correctness standard (*Canadian National Railways Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135 at para. 33). (See also *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52, 371 Nfld. & P.E.I.R. 137 at para. 16.) The application of a statutory provision to a set of facts is generally a question of mixed fact and law reviewable on the standard of palpable and overriding error, unless the Judge made an extricable error in principle in so doing.

ANALYSIS

Discussion

Class Actions

[29] Class actions are a relatively recent development in Canadian law, having been enabled by the passing of legislation in most Canadian jurisdictions. Newfoundland and Labrador's class action legislation, enacted in 2001, provides a comprehensive scheme for the prosecution of class actions – defining them, establishing the criteria for their certification, and governing their conduct.

[30] The purposes of class actions are to promote access to justice, enable judicial economy, and modify behavior by providing for multiple actions to be heard together (*Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15 per McLachlin C.J.C.). In *Hollick*, the Chief Justice described these advantages as follows:

... First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behavior to take full account of the harm they are causing, or might cause, to the public. ...

(See *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 for a more comprehensive explanation of the purposes

of class actions. See also *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (2d) 143 (Div. Ct.)).

Counterclaims

[31] This case involves a counterclaim asserted by a sole defendant in a certified class action.

[32] Counterclaims are provided for in Rule 11 of the *Rules of the Supreme Court, 1986*. In pertinent part, rules 11.01, 11.03(a), and 11.04 read:

11.01. (1) Where a defendant has a claim against a plaintiff in respect of any cause of action, whenever and however arising, the defendant may, instead of bringing a separate proceeding, make a counterclaim in respect of the claim.

...

11.03. A counterclaim is a separate proceeding and the Court may

(a) proceed with the counterclaim notwithstanding that judgment may be entered for the plaintiff in the original proceeding, or the original proceeding is stayed, discontinued or dismissed;

...

11.04. The provisions of these rules shall apply, with any necessary modification, to a counterclaim as if the counterclaim were a statement of claim and the defendant making it, the plaintiff, and to the defence to the counterclaim, as if it were a defence and the party making it, a defendant.

[33] At paragraph 9 of *Home Hardware Stores Limited v. R. Home Supply Centre Ltd.*, 2015 BCCA 500, 83 B.C.L.R. (5th) 36, Newbury J.A., adopting McLachlin J.'s words from *Royal Bank of Canada v. Rizkallo* (1984), 59 B.C.L.R. 324 (S.C.), described a counterclaim in the context of distinguishing it from a defence:

A defence is a contention that the plaintiff's claim is not established. It adopts one or more of the following positions:

- (i) an objection on grounds of jurisdiction;
- (ii) a denial of the plaintiff's allegations (traverse);
- (iii) a submission that if the plaintiff's allegations are true they disclose no cause of action (demurrer); and

(iv) a submission that if the plaintiff's allegations are true there are facts which provide a legal justification for the defendant's conduct (confession and avoidance).

A counterclaim, on the other hand, is an independent action raised by a defendant, which, because of the identity of the parties, can conveniently be tried with the plaintiff's claim. While a counterclaim frequently (although not necessarily) arises from the same events as the plaintiff's claim, and while it may result in reduction of the plaintiff's claim, it is in principle an independent action.

[34] In other words, if a defendant wishes to pursue a claim against the plaintiff who is suing him or her, he or she can do so within the plaintiff's suit by filing a counterclaim, although such a defendant is free to file a claim as an ordinary plaintiff outside and regardless of the plaintiff's suit.

[35] A counterclaim is distinctly different from a set-off. A set-off is part of a defence pleaded by a defendant against a plaintiff in defence to the whole or part of a claim made by the plaintiff. Set-off is provided for in rule 14.19:

Where a claim by a party to a sum of money, whether the amount is ascertained or not, is relied on as a defence to the whole or part of a claim made by an opposing party, it may be included in a defence and set-off against the claim, whether or not it is also added as a counterclaim.

[36] In *Home Hardware*, Justice Newbury described the defence of set-off as an equitable defence that goes directly to impeach the plaintiff's demands (paragraph 10). If proved, the amount of the set-off may be subtracted from any amount awarded to the plaintiff to the extent of the plaintiff's award, potentially reducing the plaintiff's award to zero.

[37] In other words, if the plaintiff succeeds in proving his or her claim, and the defendant succeeds in proving his or her defence of set-off, the defendant will be able to deduct the amount of its set-off up to the amount of the plaintiff's award but not amounts in excess of the plaintiff's award. This is in contrast to a counterclaim, which, because it is an independent cause of action, is "not governed by the same rules or subject to the same limitations" as a set-off (*Beddall v. Maitland*, [1879] 17 Ch. D. 174 at 178).

[38] Accordingly, when a defendant files a counterclaim, the defendant becomes a plaintiff by counterclaim, and the original plaintiff becomes a defendant by counterclaim, as rule 11.04 provides and long-standing practice

has established. In this case, that means that for all intents and purposes related to its counterclaim, including certification, CNA is a plaintiff. Having filed suit as a plaintiff by counterclaim, CNA must comply with the provisions of the *Act*, including the criteria for certification, like any other plaintiff seeking to commence an action under the *Act*. Commencing a counterclaim in the class actions context is more involved than doing so in the ordinary (non-class action) context. In the latter context a defendant can commence a counterclaim at will; in the class actions context, a counterclaim can only be brought if the requirements of the *Act* are met.

The distinction between plaintiff class actions and defendant class actions

[39] Fundamental to this appeal is the distinction between plaintiff class actions and defendant class actions. They are not the same. The *Act* provides for plaintiff class actions. Section 3 of the *Act* provides for a plaintiff to commence a class action. In pertinent part, it reads:

3. (1) One member of a class of persons who reside in the province may commence an action in the court on behalf of the members of that class.
- (2) The member who commences the action shall apply to a judge of the court within the time period in subsection (3) for an order certifying the action as a class action and appointing the member as the representative plaintiff.

...

[40] Section 4 of the *Act* provides for a defendant to certify a plaintiff class if the defendant is sued by more than one plaintiff and the plaintiff's class has not already been certified. It reads:

4. A person who is named as a defendant in more than one action in the court may apply to a judge of the court for an order certifying the actions as a class action and appointing a person to be the representative plaintiff.

[41] Section 4 is clearly directed to judicial economy by permitting a defendant who is facing more than one individual action to apply to the court for certification of the two or more actions against it as a class action and to have a representative plaintiff appointed from among the two or more plaintiffs in the individual actions.

[42] Defendant class actions are different. A defendant class action is when two or more defendants are certified as a class (Ward Branch, *Class*

Actions in Canada, looseleaf (Toronto: Canada Law Book, 2000) at paras. 4.69 and 4.1170). There is no provision in the *Act* for defendant class actions. The Newfoundland and Labrador legislation is not alone in this respect. Class action legislation in Nova Scotia, New Brunswick, Quebec, Manitoba, Saskatchewan and British Columbia also does not provide for defendant class actions. This is in contrast to Ontario's legislation which provides for defendant class actions – where a plaintiff can apply to certify a class of one or more defendants and have a representative defendant appointed from the defendant class (Branch, *supra*). In this regard see *The Chippewas of Sarnia Band v. Canada (Attorney General)* (1996), 29 O.R. (3d) 549, 137 D.L.R. (4th) 239 where the plaintiff Band applied for and obtained certification of several defendants as a class and the action as a defendant class action.

[43] Ontario's class action legislation was passed a decade prior to the *Act*, which suggests that this province made a policy choice, like several other Canadian provinces, not to provide for defendant class actions in its enabling legislation.

[44] There is one reference to counterclaims in the *Act*. It is found in section 19(6) which concerns notice of certification:

(6) Unless the court orders otherwise, a notice given under this section shall

...

(d) describe any counterclaim or third party action being asserted in the action including the relief sought; ...

[45] Accordingly, section 19(6) of the *Act* requires that class members be notified if a counterclaim or third party action is asserted in their class action. This notice provision presumes that a plaintiff class action has already been certified and that a counterclaim has been filed. However, the notice provision does not displace the necessity for the counterclaim to comply with the certification provisions of the statute. This is not to say that counterclaims cannot ever be commenced under the *Act*. Rather, it is to say that whenever a counterclaim or third party action is asserted by a defendant or defendants, the class members must be notified.

Can CNA's counterclaim be certified under the Act?

[46] Part I of the *Act* deals with certification, and sections 3(1) and (2) address the application process for a litigant seeking to have a class action certified. Section 3(1) reads:

One member of a class of persons who reside in the province may commence an action in the court on behalf of the members of that class.

[47] Section 3(2) of the *Act* addresses the application process. It reads:

The member who commences the action shall apply to a judge of the court within the time period in subsection (3) for an order certifying the action as a class action and appointing the member as the representative plaintiff.

[48] In this case, CNA, a corporate entity, is the sole defendant in the plaintiff's class action and the sole plaintiff by counterclaim. As a sole plaintiff by counterclaim, it is not a member of a class of persons who reside in the province on whose behalf it is seeking to take action. Accordingly, CNA as a sole plaintiff cannot comply with section 3(1) of the *Act* so as to commence a class action or section 3(2) so as to apply for certification of a class action on behalf of members of a class.

[49] Section 4 of the *Act* permits a defendant in more than one action to apply to certify all of the actions against it as a class action so as to have them heard and decided together if the criteria for certification are met. In this case CNA is the sole defendant in a plaintiff class action. It is not named as a defendant in more than one action so as to apply to have the actions against it certified as a class. If Ms. Thorne and several members of the class had filed individual suits, then CNA as a defendant in more than one action could have applied under section 4 to have the individual suits against it certified as a class action to avoid being saddled with defending several different actions individually. The benefit of section 4 to CNA has already been achieved by the certification of Ms. Thorne's class action and her appointment as the representative plaintiff.

[50] In the result, CNA's application for certification cannot comply with either section 3 or 4 of the *Act*. It is neither a plaintiff acting on behalf of class members nor a defendant to two or more actions.

[51] In reality, the counterclaim which CNA seeks to prosecute against a group of defendants (who constitute some, but not all, of the plaintiff's

class) is a defendant class action. CNA is the plaintiff seeking to certify a group of defendants as a class. The *Act* does not provide for certification of a class of defendants or for a sole plaintiff to apply to certify an action against a class of defendants. Nor is there any provision for the appointment of a representative defendant to fairly and adequately represent the interests of a defendant class.

[52] CNA's inability to fit within section 3 of the statute so as to apply for certification of its counterclaim means that it cannot get out of the starting gate. Indeed CNA's counsel admitted on appeal that CNA could not fit within the provisions of the statute if it had attempted to certify CNA as a class by commencing a plaintiff class action as opposed to commencing a counterclaim. If CNA cannot achieve its goal of certifying a claim as plaintiff, sole or otherwise, against a group of employees as a class action, surely it cannot do so indirectly by virtue of a counterclaim. This would constitute an end-run around the requirements for certification. On this basis alone, CNA's counterclaim should be struck and Ms. Thorne's appeal allowed.

Does CNA's counterclaim disclose a cause of action?

[53] Whether CNA's counterclaim discloses a cause of action has been a central issue for both Ms. Thorne and CNA in the Supreme Court and in this Court. Because it raises an important issue, it must be addressed.

[54] Section 5 of the *Act* sets out requirements to be met for certification of a class action applied for under either section 3 or 4:

(1) On an application made under section 3 or 4, the court shall certify a class action where:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise a common issue, whether or not the common issue is the dominant issue;
- (d) a class action is the preferable procedure to resolve the common issues of the class; and
- (e) there is a person who

- (i) is able to fairly and adequately represent the interests of the class,
- (ii) has produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and
- (iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

[55] The first criterion is that the claim proposed for certification must disclose a cause of action (section 5(1)(a)).

[56] Any plaintiff claim must disclose a cause of action and CNA's counterclaim is no exception. In *Letang v. Cooper*, [1964] 2 All E.R. 929 (C.A.) at 934 Lord Justice Diplock defined a cause of action as "...simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person". This definition has been consistently relied on in Canadian jurisprudence and by this Court for many years. Accordingly, CNA's counterclaim must assert facts which, if proved, entitle, or potentially entitle, the plaintiff to a remedy at law. Also, while not always essential, statements of claim generally state the principle or principles of law which give rise to the entitlement claimed.

[57] Ms. Thorne appeals the Judge's decision to certify CNA's counterclaim on the basis that it does not, as pleaded, disclose a cause of action. In *Canada (Attorney General)*, this Court explained that the test for determining whether a claim discloses a cause of action is whether "it is plain and obvious that the claim cannot succeed":

[30] In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, (filed subsequent to submissions of the parties on this appeal) McLachlin C.J. reiterated:

[20] The test for striking out pleadings is not in dispute. The question at issue is whether the disputed claims disclose a cause of action, assuming the facts pleaded to be true. If it is plain and obvious that a claim cannot succeed, then it should be struck out: ...

[58] This Court also referred to paragraphs 22 and 24 of *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 as instructive on the proper approach to addressing applications to strike:

[22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[23] ... Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.

[24] This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action it is asserting. If new developments raise new possibilities — as they sometimes do — the remedy is to amend the pleadings to plead new facts at that time.

Accordingly, the question is whether it is plain and obvious that CNA's counterclaim cannot succeed.

[59] Before examining CNA's counterclaim, it is helpful to examine Ms. Thorne's pleadings. They allege that the members of the class were instructors or support staff of CNA in Qatar whose standard form employment contracts stipulated that they were entitled to receive the Cost of Living Allowance (COLA) that CNA invoked and provided retroactive to September 1, 2008 in addition to their annual salaries. In paragraph 24 of Ms. Thorne's application for certification, she explained the basis of her claim:

THAT the Plaintiff repeats Paragraphs 11 and 12 above and states that the claim is an alleged breach of contract, which by virtue of Article 5.2 of the Terms and Conditions of Employment for Employees of CNA-Q, every contract employee that falls within the Class definition is entitled to any COLA funds obtained by the Defendant from the State of Qatar...

[60] Ms. Thorne does not plead or rely on any contract or agreement between CNA and Qatar. Nowhere in her Statement of Claim or her

Amended Statement of Claim is there reference to the Comprehensive Agreement between CNA and Qatar. She simply pleads entitlement to monies from CNA based on the terms of the class members' employment contracts with CNA, which she alleges provided for CNA to pay the COLA to class members and which she alleges CNA did not do.

[61] Ms. Thorne's application for certification also does not refer to the Comprehensive Agreement. The reference to "COLA funds obtained from Qatar" in Ms. Thorne's application for certification is not a pleading. Neither is it an assertion that COLA funds were due either to them or to CNA from Qatar. Rather, it is an explanatory statement in her application that COLA funds alleged to be due the class members had been received by CNA from Qatar and not passed on to the class members. There is a difference between material facts pleaded in a statement of claim and explanatory information in an application related to an action.

[62] Ms. Thorne's action was certified and the certification was upheld by this Court. It is also worth noting that CNA admitted at the certification hearing that Ms. Thorne's pleadings disclosed a reasonable cause of action.

CNA's Counterclaim

[63] CNA's counterclaim bears scrutiny so as to determine whether it pleads material facts that disclose a cause of action which entitles CNA to a remedy at law, or, in other words, whether it is plain and obvious that it cannot succeed. CNA's counterclaim is pleaded as follows:

13. The Plaintiff by Counterclaim, College of the North Atlantic ("CNA"), is a post secondary educational and skills training institution which operates in various locations in Newfoundland and Labrador and has a mailing address of 432 Massachusetts Drive, Stephenville, Newfoundland and Labrador, A2N 2Z6. At all material times to this counterclaim, CNA, pursuant to a contract with the State of Qatar, agreed to provide and deliver educational programs and administrative services to the college owned by the State of Qatar and located in Doha, Qatar (the "Comprehensive Agreement"). The Comprehensive Agreement permitted the college to be called and operate under the name College of the North Atlantic – Qatar ("CNA-Q").
14. The Defendants by Counterclaim are the class members as represented by Deborah Thorne. Mrs. Thorne resides in the City of St. John's, in the Province of Newfoundland and Labrador, A1A 3M2. At all material times

to this counterclaim, the Defendants by Counterclaim were employed by CNA to be instructors or provide instructor support at CNA-Q.

15. CNA relies on the preceding paragraphs hereof without restating them in this counterclaim.
16. The total compensation offered to instructors and instructor support persons at CNA-Q was based upon the budget agreed upon between CNA and the State of Qatar in accordance with the Comprehensive Agreement. Under the Comprehensive Agreement salaries paid to instructors and instructor support employees providing services at CNA-Q were to be capped at different levels based upon each particular employee's qualifications (the "Salary Cap").
17. The Plaintiff and some other class members were actually paid amounts that exceeded the maximum amounts for which the State of Qatar has agreed to reimburse CNA. For example, in June 2008 when Deborah Thorne was offered her Second Employment Contract (to run from 17 August, 2008 to 31 July, 2010), based upon her qualifications, her total compensation should have been capped at \$92,419.00 CDN. However, in error, the total compensation that was offered in her Second Employment Contract was in excess of the Salary Cap.
18. To the extent that the claims of the Plaintiff and class members of entitlement in accordance with the maximum amounts provided for under the Comprehensive Agreement (the Salary Cap as defined above) succeeds, CNA claims back from the Defendants by Counterclaim (i.e. each individual class members) all amounts that were paid above the maximum amounts for which the State of Qatar agreed to reimburse CNA for each instructor or instructional support employee in the class.
19. The Plaintiff by Counterclaim claims against each class member any and all amounts that were paid in excess of the Salary Cap. For example, CNA claims special damages in the amount of \$7,093 against Deborah Thorne as this was the amount she was overpaid during her term of employment with CNA.
20. Therefore, the Plaintiff by Counterclaim claims against the Defendants by Counterclaim; i.e. each individual class member who was paid more than the Salary Cap:
 - a. special damages, in the amount of overpayment;
 - b. interest pursuant to the *Judgment Interest Act*, RSNL 1990, c. J-2; and

c. such further and other relief as this Honourable Court shall allow.

[64] The counterclaim pleads, incorporated from CNA's defence, that members of the plaintiff class and CNA had contractual relationships. CNA also pleads that members of the plaintiff class were paid more than the amounts CNA agreed with Qatar to pay them pursuant to a contract CNA had with Qatar known as the Comprehensive Agreement. At the same time, CNA pleads, incorporated from its defence, that members of the plaintiff class were not privy to the Comprehensive Agreement and cannot rely on its terms.

[65] The Comprehensive Agreement is a contract CNA entered into with Qatar, a third party. Any agreement CNA had with Qatar is immaterial to the plaintiff class unless the members of the plaintiff's class were privy to or bound by it. CNA can make whatever contracts it wants with whatever third party it wants, but its contracts with third parties cannot bind the members of the plaintiff class unless they agreed to be bound by them. There is nothing in CNA's pleadings that asserts that members of the plaintiff class were privy to or bound by the Comprehensive Agreement. In fact, CNA specifically pleads that members of the plaintiff class cannot rely on the Comprehensive Agreement. Therefore, the Comprehensive Agreement between CNA and Qatar cannot be a basis for CNA's entitlement to a remedy from members of the plaintiff class.

[66] This Court's decision in *Humby Enterprises Ltd. v. A.L. Stuckless & Sons Ltd.*, 2003 NLCA 20, 225 Nfld. & P.E.I.R. 268 at paras. 3 to 10 instructs in this regard. In *Humby*, the plaintiff subcontractor (Humby) commenced an action in contract against Stuckless, the general contractor, as well as against Corner Brook Pulp & Paper, a third party. Stuckless had entered into a contract with Corner Brook, but Humby had no contractual relationship with Corner Brook. Humby's claim against Corner Brook was struck by Green J. (as he then was) on the basis that no material facts were pleaded which established a contractual relationship the breach of which would entitle Humby to a remedy at law against Corner Brook. The striking of Humby's claim against the third party was upheld by this Court, with Welsh J.A. writing that the pleadings did not disclose a contractual relationship between Humby and Corner Brook so as to entitle Humby to a remedy.

[67] A similar triangle of parties is at play in CNA's counterclaim. CNA, like the plaintiff in *Humby*, is relying on a contract it has with Qatar, to

which Ms. Thorne and the class members are not party. In its counterclaim CNA has not pleaded any material facts which entitle it to a remedy in contract against the plaintiff class. CNA's pleadings do not allege that members of the plaintiff class had a contractual relationship with Qatar or that the members of the class were bound by the terms of the Comprehensive Agreement respecting salary caps. Neither does CNA allege any breach of the employment contracts it had with the members of the plaintiff class. Moreover, there is no indication in the record or the pleadings that such a breach of contract could be pleaded. CNA's assertion that members of the plaintiff class were mistakenly overpaid is not a breach of contract by the members of the plaintiff class. Accepting that members of the plaintiff class were overpaid, there is no further pleading as to how or why this fact entitles CNA to recover the overpayments. This is not to say that CNA would never be able to take some sort of action to recover monies it mistakenly overpaid to members of the plaintiff class. Rather, it is to say that such an action could not be based on a breach of the contracts between CNA and members of the plaintiff class based on the Comprehensive Agreement. The allegation that some members of the plaintiff class were paid more money than what CNA and Qatar agreed they should be paid would only be material to CNA's counterclaim if the class members were bound by the agreement between CNA and Qatar. What is material to the claim CNA makes against the class members is not what CNA agreed to with Qatar, a third party, but what CNA agreed to in the contracts CNA had with the class members. CNA has not pleaded any facts which entitle it to a remedy at law against class members. Accordingly, CNA's counterclaim does not disclose a cause of action and therefore does not meet the requirement of section 5(1)(a) of the *Act*. It cannot be certified and must be struck. It is, as the first certification judge said, irremediably defective.

[68] Something must also be said about the Judge's reliance on section 13 of the *Act* as giving him authority to entertain or certify CNA's counterclaim was also in error. Section 13 is directed to the conduct of a class action that has already been certified. Section 13 in no way touches on an application for certification of a class action nor displaces the need for compliance with section 5 of the *Act*.

Other Issues

Common Issue

[69] CNA explained that its counterclaim is not against all members of the plaintiff class but only against approximately half of them. The common issue as stated by the Judge is whether members of the class who received compensation greater than the amount provided for in the annual budget and salary cap provisions set out in the Comprehensive Agreement during the period of September 1, 2008 and November 22, 2011 are required to repay the excess amounts to CNA. The proposed defendants were not identified, although CNA pleads that only some members of the plaintiff class were overpaid and that Ms. Thorne is one of them. It is immediately apparent that the common issue is not an issue common to all members of the class (section 5(1)(c) of the *Act*), even if defendant class actions were permitted under the *Act*. While members of a class do not have to be identically situated in every respect, they must share a common issue.

Ms. Thorne's Appointment as the "Defendant Representative"

[70] The Judge appointed Ms. Thorne as a "representative defendant". As noted above, the *Act* does not provide for defendant representatives. Even if the *Act* provided for defendant class actions and the appointment of representative defendants, which it clearly does not, Ms. Thorne would not be an appropriate representative defendant. Ms. Thorne has been appointed, pursuant to section 5(1)(e), as the representative plaintiff who is fairly and adequately able to represent the interests of the plaintiff class members. As one of the members of the plaintiff class CNA alleges were overpaid, however, her interests diverge from the members of the class who were not overpaid. In fact, they are in direct conflict with those members of the certified plaintiff class who are not alleged to have been overpaid. The conflict is illustrated by considering that Ms. Thorne's representation of the class could well be influenced by the prospect of her ultimately owing more to CNA than she would recover from CNA, therefore inclining her to settle or discontinue the action so as to protect herself and others in her position while forsaking the members of the class who were not overpaid by leaving them without representation or remedy.

[71] In summary, the Judge erred by determining that CNA's counterclaim met the statutory requirements for certification, by determining that CNA's counterclaim disclosed a cause of action, by determining that CNA's

proposed common issue was a common issue, by appointing Ms. Thorne as representative defendant.

Alternative Procedures

[72] Finally, the possibility of CNA pleading the defence of set-off arose during the appeal hearing. Pleading the defence of set-off would not engage the requirements of sections 3 or 5 of the *Act* in the way a counterclaim would. Nor would it enable CNA to pressure members of the class who were allegedly overpaid in the way that a counterclaim could, because the reach of set-off extends to and ends at the amount awarded to a plaintiff. CNA frankly acknowledged at the appeal hearing that its reason for counterclaiming rather than pleading the defence of set-off was that counterclaiming gave it a tactical advantage over the class members by setting up the prospect that class members could end up owing more to CNA than they would recover from CNA if they succeeded in their class action, thereby pressuring the class members to abandon their class action out of fear that they would end up owing more than they would recover. In any event, even if CNA were to plead the defence of set-off, CNA would still have to prove the defence, and if it were pleaded in contract, such proof would require CNA to prove that members of the plaintiff class were bound by the terms of the Comprehensive Agreement including the salary cap – something which they do not appear to be able to do.

[73] In the result, I would strike CNA's counterclaim and allow Ms. Thorne's appeal. In accordance with the costs regime established in section 37 of the *Act*, I would make no order as to costs.

L.R. Hoegg J.A.

I concur: _____

B.G. Welsh J.A.

I concur: _____

F.P. O'Brien J.A.